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No. 05-

IN THE

Supreme Court of the United States

WILLIAM R. DORN, SR., *et al.*,

Petitioners,

v.

GENERAL MOTORS CORPORATION, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The following two questions are presented:

1. Does an Intake Questionnaire that fully informs the EEOC of all aspects of plaintiff's age discrimination claim under the Age in Employment Discrimination Act suffice to meet the requirements of the EEOC's charge-filing requirements.

2. When employees are forced to choose between signing a waiver presented by the employer and the union, accepting either employment or retirement, both of which violates their rights under the employer/union Collective Bargaining Agreement, or be laid off with out pay, and the employees sign waivers under protest, do their arguments fall under the totality of the circumstances criteria.

PARTIES TO THE PROCEEDING

Petitioners

William R. Dorn, Victor A. Babecki, Stephen J. Barnacz, Ronald C. Bell, Martin T. Binz, Stephen D. Boelker, Willie G. Byrd, August M. Falcone, Frank Garzio, Peter Golowatsch, Thomas M. Gurba, James D. Jareszewski, Anthony Malinoskie, Stanley Marziarz, Henry Palejczyk, Robert Ryan, James H. Sexton, Kenneth T. Satrycharz, Charles Upshur, Francis Witkowski, and James Zeek.

Respondents

General Motors Corporation, Delphi Automotive Systems, and the United Automobile, Aerospace and Agricultural Implement Workers of America, International Union (UAW).

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OPINION BELOW

The Opinion of the United States Court of Appeals for the Sixth Circuit is an unpublished opinion, which is attached as Appendix A. The trial court did not issue an opinion; instead it relied on its statements in the record, which is attached as Appendix B and C.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Labor Management Relations Act, 29 U.S.C. § 185.

The Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634, and 28 U.S.C. § 1331.

STATEMENT OF THE CASE

Petitioners are twenty-one employees of General Motors Corporation ("GM") who were employed at GM's Trenton, New Jersey facility. In 1999 GM spun off its Delphi Automotive Division into a public corporation independent of GM. This corporation became known as Delphi Inc. ("Delphi"). Petitioners were also members of the United Auto Workers International Union ("UAW"), which had a Collective Bargaining Agreement ("CBA") with both GM and Delphi. With a couple of exceptions the ages of Petitioners ranged between 48 and 55 with an average employment of 25 years.

Under the Delphi-UAW CBA all Petitioners were paid by Delphi as laid off employees until Delphi could place them into a Delphi facility within 50 miles of their home plant, the GM Trenton, New Jersey facility, a facility that Delphi never bought from GM. All Petitioners were skilled tradesmen and Delphi could not place them into a Delphi facility within 50 miles of the Trenton facility.

Subsequently, Petitioners were ordered by Delphi to make one of the following choices: either (1) accept employment at a Delphi facility 400 miles from the Trenton facility; or (2) accept a pension; or (3) be placed on an indefinite layoff without benefits.

Under either the GM-UAW CBA, or the Delphi-UAW CBA, Petitioners had a contractual right to refuse an offer to transfer to a Delphi facility that was located at a distance greater than 50 miles from the GM Trenton facility. Thus, when refusing an offer to transfer to a facility that was further than a radius of 50 miles from Trenton Petitioners would remain on the payroll, in what was called "Protected Status," until such time as they could be placed on a job within the CBA's defined 50 miles radius.

Also, under either the GM-UAW, or Delphi CBA, Petitioners could not be forced to retire under the Pension Plan. All retirements were voluntary, such as a mutual early (agreement by the employee and employer), normal retirement, "30 and out," etc.

Delphi and GM, with the concurrence of the UAW, told Petitioners, in writing, that if they wanted to avoid a layoff without pay, which would mean 10 to 15 years at their ages of 48 to 55, they would have to accept either a transfer beyond the 50 mile radius or retire. But, if they accepted either a transfer or

retirement, to avoid being laid off without pay for the 10 to 15 years, they would have to sign a waiver freeing GM, Delphi, and the UAW from being sued for violating their contractual rights.

Twenty of the Petitioners signed the waivers, under protest, by either transferring to a Delphi facility or taking retirement, while one Petitioner transferred to a Delphi facility without signing a waiver. Petitioners also filed an Intake Questionnaire with the EEOC alleging age discrimination under the Age Discrimination in Employment Act.

Petitioners age discrimination claim was based on the following facts: (1) all Petitioners age 48 and older were ordered to accept either a transfer 400 miles away or retire, or be laid off without benefits for the rest of their time until age 65; and (2) a union official at the Trenton facility, who was 44 years of age, was allowed to refuse a transfer to a Delphi location 400 miles away from Trenton, and remain in "Protected Status" for *six years* until he reaches 50 years of age where he could accept early retirement.

On 10 January 2001, Petitioners filed an Intake Questionnaire with the EEOC on their age discrimination claim. In their Questionnaire Petitioners stated who they were; they named the employer and the union involved; and the basis of their claim. Petitioners held numerous telephone conversations with EEOC personnel at its Philadelphia, Pennsylvania office during 2001.

Subsequently, in December 2001 the EEOC mailed a "Charge of Discrimination" to Petitioner Dorn who returned the completed form to the EEOC on 19 December 2001. The EEOC subsequently issued a "Right-to-Sue" letter on 3 March 2003. The EEOC did not state on its Right -to-Sue letter that Petitioners' Charge of Discrimination was filed untimely.

On 15 November 2000 Petitioners signed a grievance protesting management's violation of their CBA rights. In their Answers to the Complaint Defendants GM, Delphi, and the UAW denied that Petitioners ever filed a grievance. Nevertheless, during discovery in 2003 Respondents admitted that the grievance filed by Petitioners was withdrawn from the grievance procedure on 5 March 2001, which was unknown to Petitioners.

REASONS FOR GRANTING THE PETITION

There are two reasons for allowance of the writ. One is a compelling reason to grant the writ since there is a conflict among the courts of appeals on whether a properly completed EEOC Intake Questionnaire, alleging age discrimination under the ADA, satisfies the charge-filing requirements of the EEOC. In the present case the Sixth Circuit takes the narrow view that only the form titled "Charge of Discrimination" satisfies the EEOC's charge-filing requirement.

Other Circuits, most notably the Seventh Circuit, followed by the Fourth, Fifth, and Ninth Circuits, and others in one fashion or another, hold that a properly completed Intake Questionnaire that fully informs the EEOC of the parties and the issues satisfies the EEOC's time limitations period and a subsequent filing of an EEOC form titled "Charge of Discrimination" relates back to the filing of the properly completed Intake Questionnaire.

Uniformity among the Circuits on an important procedural matter vital to the intent of federal legislation, which is to make the courts available to lay persons without standing on form over substance in filing legitimate claims of age discrimination, justifies this Court's review.

The second reason for allowance of the writ is for this Court to exercise its supervisory powers on an issue that is becoming ever more crucial in the American society in the 21st Century. This issue is the ability of employers and unions to improperly dispense with the economic rights and benefits of employees under a CBA, to which the employer and the union are parties, by hiding behind their use of "waivers."

Petitioners' case is unique. There is no other case similar to that of Petitioners on the issue of signing a Waiver under a claim of duress when forced to violate their rights under the CBA or accept a lay off without benefits after twenty-five years of loyal service to the employer.

I. REVIEW IS WARRANTED TO RESOLVE A CONFLICT AMONG THE CIRCUIT COURTS CONCERNING WHETHER A COMPLETED EEOC INTAKE QUESTIONNAIRE FOR AN ADEA COMPLAINT CONSTITUTES A CHARGE THAT SATISFIES THE 300 DAY TIME LIMITATIONS PERIOD.

A. The Sixth Circuit's holding is too restrictive and is in conflict with the better reasoned holdings of other Circuits.

In its opinion the Sixth Circuit stated "Plaintiffs do argue that the district court should have construed their November 2000 inquiry and January 2001 submission of a questionnaire as the equivalents of a formal charge. However, the statutory language requiring a formal charge, not simply an inquiry or complaint, is clear. *See* U.S.C. § 626(d)." (Appx. A at 13a, note 7).

In its holding, the Sixth Circuit cites only two cases in support of its position. First, a non-Sixth Circuit case, the Court cites *Diez v. Minn. Mining & Mfg. Co.*, 88 F.3d 672, 677 (8th Cir. 1996) for the proposition that a questionnaire is ". . . not a formal charge of discrimination within the meaning of the ADEA.(App. A at 13a, notes 6 and 7). The Court then cites a Sixth Circuit case, *Weigel v. Baptist Hosp.*, 302 F.3d 367, 376 (6th Cir. 2002), to state that a district court can ". . . in its discretion equitably toll the running of this period. (Appx. A at 14a).

The issue before the Sixth Circuit was not equitable tolling, but that Petitioners' Intake Questionnaire was sufficient to invoke the EEOC's charge-filing requirements. In Petitioners' case, the Sixth Circuit did not cite a single Sixth Circuit decision holding that an Intake Questionnaire, in and of itself, could not invoke the EEOC's charge-filing requirements. Moreover, in Petitioners' case, the Sixth Circuit ignored the well reasoned holdings of other Circuits which state that a well grounded Intake Questionnaire that adequately informs the EEOC of all the information that would be included in a "Charge of Discrimination" is sufficient to fulfill the EEOC's charge-filing requirements.

The Sixth Circuit's decision is a narrow view of the intent of the ADEA. Here, the Sixth Circuit places the full burden on the plaintiff to ensure that the EEOC operate in a timely and efficient manner. This decision of the Sixth Circuit is contrary to the views of other Circuits, as argued below, which hold that the procedural requirements of the ADEA should be broadly construed to give effect to the intent of Congress in passing legislation to assist individuals faced with viable claims of age discrimination.

In effect, the Sixth Circuit followed the trial court's reasoning. Here, the trial court stated

> However, co-plaintiff Dorn filed a charge against Delphi and another charge against the UAW in December 2001, but these were filed more than three hundred days after the plaintiff knew of the alleged discrimination. The filing of a timely EEOC charge is a prerequisite to suit, and plaintiff just simply missed the filing deadline.

(Appx. B at 24a). Thus, the district court took the narrow view that only the completed form titled "Charge of Discrimination" will suffice for the EEOC's charge-filing requirement.

Both the trial court and the Sixth Circuit are in conflict with the better reasoned Circuits which hold that a satisfactorily completed Intake Questionnaire is sufficient to comply with the charge-filing requirements of the EEOC. As developed below, the purpose of notice to the EEOC is to inform the EEOC that a plaintiff has a viable claim against an employer, and or a union. If the Intake Questionnaire informs the EEOC of all necessary information and nothing is left out for a proper processing of plaintiff's claim then the EEOC's charge-filing requirement is met.

Below are Petitioners' arguments, based on other Circuits, that a properly completed Intake Questionnaire is sufficient for the charge-filing requirements of the EEOC which the Sixth Circuit should follow. Moreover, in order to apply uniformity to interpretation of EEOC's procedural requirements, the broader interpretation that a properly completed Intake Questionnaire satisfies the EEOC's charge-filing requirement should apply to all Circuits.

B. The Seventh Circuit adopts a well reasoned approach that an Intake Questionnaire that details all necessary information required for an ADEA claim satisfies the EEOC charge-filing requirement.

In *W. Steffen v. Meridian Life Ins.*, 859 F.2d 534 (7th Cir. 1988); citing *Bihler v. Singer Co.*, 710 F.2d 96 (3rd Cir. 1983); *Caldwell v. Nat'l Ass'n of Home Builders*, 771 F.2d 1051 (7th Cir. 1985), the Seventh Circuit stated that "The purpose of the charge-filing requirement is to provide the EEOC with sufficient information to notify an employer that it has been charged with discrimination and to provide the EEOC with the opportunity to investigate the alleged unlawful practice as well as to provide the EEOC with the opportunity to eliminate any unlawful practice through informal conciliation." *Steffen*, 859 F.2d at 542.

The *Steffen* Court went on to state "Thus, in order to constitute a charge that satisfies the statutory requirement . . . , notice to the EEOC must be of a kind that would convince a reasonable person that the grievant has manifested an intent to activate the Act's machinery." *Ibid*, at 542; citing *Bihler*, 710 F.2d at 99; *Greene v. Whirlpool Corp.*, 708 F.2d 128 (4th Cir. 1983), *cert. denied*, 464 U.S. 1042, 79 L. Ed. 2d 171, 104 S. Ct. 707 (1984).

In *Steffens* the plaintiff was faced with a 180 day time limit in which to file his EEOC claim. On 13 May 1983 Steffens filed an Intake Questionnaire but did not file the form titled "Charge of Discrimination" until 1 December 1983. At the trial court Steffens argued that his Intake Questionnaire satisfied the EEOC's charge-filing requirements. The trial court held that Steffan's claim was untimely because he filed his "Charge of Discrimination outside of the 180 day period.

In reversing the trial court, the Seventh Circuit stated "Under the facts as alleged by Steffen, it would be a needless triumph of form over substance to hold that his completed Intake Questionnaire did not satisfy the ADEA's charge-filing requirement." *Ibid*, 859 F.2d at 543. In support of its holding the *Steffens* court noted "The ADEA's charge-filing requirement was not intended to hold persons to elaborate pleading requirements. . . ." *Steffens*, 859 F.2d at 453 (citation omitted); and "The ADEA is remedial legislation that the courts have refused to construe in a 'hypertechnical manner so as to defeat the Act's legislative purpose." *Steffens*, 859 F.2d at 453 (citation omitted).

The *Steffens* court also cited *Rabzak v. County of Berks*, 815 F.2d 17 (3rd Cir. 1987) where a letter seeking assistance was treated as a charge; and *Waiters v. Robert Bosch Corp.*, 683 F.2d 89 (4th Cir. 1982) where a mailed affidavit was treated as a charge.

Petitioners' case is similar to that in *Steffens*. Petitioners timely filed an Intake Questionnaire; the Intake Questionnaire was complete; that is, it listed the claimants, it named the employer and the union who the claimants charged with violating their right under the ADEA, it described the basis of their claim, and they sought remedial action. Like Steffens, they did all that was necessary to satisfy the charge-filing requirement.

In a latter case, the Seventh Circuit reaffirmed the *Steffens* holding. In *Downes v. Volkswagen of America*, 41 F.3d 1132 (7th Cir. 1994), the court restated its position that individuals will not be held to "elaborate pleading requirements or that would let the form of the purported charge prevail over its substance"; that an "intake questionnaire . . . constitutes a charge under the ADEA"; and that "The purpose of the chargefiling requirement

is to provide the EEOC with sufficient information to notify an employer that it has been charged with discrimination. . . ." *Downes*, 41 F.3d at 1138.

Yet, the Sixth Circuit held Petitioners to that "elaborate pleading requirement." The Sixth Circuit's approach is "form over substance." The Sixth Circuit's position is in conflict with the better view of the Seventh Circuit which holds that substance should override form. Hence, whenever an Intake Questionnaire unequivocally identifies all of the requirements of a claimant's ADEA claim, so that both the EEOC and the parties to be sued are aware of the claimant's intent to sue, then the EEOC's charge-filing requirements are met.

Respondents Delphi and the UAW did not argue that Petitioners Intake Questionnaire was incomplete; or that it lacked specificity; or was deficient in some other manner so that neither the EEOC nor Respondents could be aware of the specificity of Petitioners' claims. Respondents simply argued that the form titled "Charge of Discrimination" was not filed within the 300-day period.[1]

C. Other Courts adopting the broad view of what constitutes a charge-filing for purposes of an EEOC claim under either Title VII or the ADEA.

In a notable case, the Fifth Circuit stated that it ". . . construe[s] employment discrimination charges with the 'utmost liberality' bearing in mind that such charges are generally prepared by laymen untutored in the rules of pleading." *Price v. Southwestern Bell Telephone Co.*, 687 F.2d 74 (5th Cir. 1982);

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[1] New Jersey, where the EEOC claim arose, is a deferral state allowing for 300 days in which to file a claim.

citing *Terrell v. United States Pipe & Foundry Co.*, 644 F.2d 1112 (5th Cir. 1981).

The *Price* court held that while Price did not complete either a signed or sworn EEOC form within the applicable 180 days she, nonetheless, submitted a document "sufficient to initiate the process" which resulted in a "triable issue of fact." *Price*, 687 F.2d at 79.

Dorn is a layman, yet he completed an exhaustive four page Intake Questionnaire in December 2001 that laid out in detail who the claimants were, who were the parties that he claimed committed age discrimination, and all other relevant material. The Sixth Circuit's position that only an EEOC form titled "Charge of Discrimination" will suffice for the charge-filing time limitations is a wrong position. Neither the trial court, nor the Sixth Circuit, inquired into what Dorn wrote on the Intake Questionnaire. To both the trial court and the Sixth Circuit the only thing that mattered was form — substance was immaterial. Petitioners' writ requires a hearing to determine guidelines for the courts of appeals in their giving weight to, and consideration of, Intake Questionnaires that, in effect, function as a Charge of Discrimination. Without such guidelines from this Court some Circuits will continue to place form over substance.

In *Rogan v. Giant Eagle, Inc.*, 113 F. Supp. 2d 777 (U.S. Dist. W.D. of Penn. 2000), the Court, while dismissing plaintiff's complaint, noted "With regard to Ms. Rogan's intake questionnaire, we are in agreement with those courts which have determined that a questionnaire may constitute official charges for statutory purposes." *Rogan v. Giant Eagle*, 113 F. Supp. 2d at 782.

Some of the cases cited by the *Rogan* Court were *Peterson v. City of Wichita*, 888 F.2d 1307 (10th Cir.), *cert. denied*, 495 U.S. 932, 109 L. Ed. 2d 502, 110 S. Ct. 2173 (1989); *Casaventes v. California State Univ.*, 732 F.2d 1441 (9th Cir. 1984); and *EEOC v. Sears Roebuck & Co.*, 650 F.2d 14 (2nd Cir. 1981).

In *Peterson*, the Tenth Circuit held that ". . . an unverified charge is a timely filing if it is subsequently amended by a charge executed under oath or affirmation." *Peterson*, 888 F.2d at 1308, 1309. Dorn subsequently amended his detailed Intake Questionnaire with a Charge of Discrimination in December 2001. The facts in *Peterson* are similar to those in *Dorn*. Peterson filed an "unverified charge" while Dorn filed a detailed Intake Questionnaire. Both followed up with a signed "Charge of Discrimination." Peterson was allowed a relation back — Dorn was not because both the trial court and the Sixth Circuit took the position that an Intake Questionnaire cannot be a basis to implement the EEOC's charge-filing requirements.

The Ninth Circuit's case of *Casavantes* is very similar to the *Dorn* case. Casavantes filed an Intake Questionnaire within the 300 day period, but did not file his "Charge of Discrimination" until after the 300 day period. Nevertheless, the Ninth Circuit held that the Intake Questionnaire was sufficiently precise to identify the parties and to describe the general actions of the complaint. The *Casavantes* court stated

> * Consequently, while Casavante's (sic) questionnaire was not signed or verified, those deficiencies were cured by amendment when the formal charge document was filed on April 14, 1979 [beyond the 300 day period]. We are thus led to the inescapable conclusion that the

> completed Intake Questionnaire, in the context of both the amendment procedures and the liberality to be ascribed to the procedural requirements, is sufficient to constitute a charge. *Casavantes*, 732 F.2d at 1443.

This is the *Dorn* case. The Sixth Circuit is seriously in conflict with other Circuits that hold to a broader interpretation of what constitutes a proper charge-filing. The Sixth Circuit, and those other Circuits that adopt the same position as the Sixth, should be viewing Intake Questionnaires in the same light as the Seventh, the Ninth, the Tenth, and the other Circuits and District Courts that adopt the same view. Only by granting the writ can this Court issue guidelines to all Circuits that will be in keeping with these Circuits, the Seventh, the Ninth, the Tenth, and others.

D. A District Court within the Sixth Circuit

One district court within the Sixth Circuit deviated from the Sixth Circuit's position by holding that if "the intake questionnaire contains all of the information required to be set forth in a charge," then "the intake questionnaire suffices as a charge." *Dimas v. Michigan Dept. of Civil Rights*, (U.S. W.D. Mich. Case No. 4:02-CV-178, 2004 LEXIS 4834).

The *Dimas* Court noted the holdings in the Eighth Circuit, *Schlueter v. Anheuser-Busch*, 132 F.3d 455 (8th Cir. 1998), and *Pijnenburg v. West Georgia Health System*, 255 F.3d 1304 (11th Cir. 2001) where the courts held that an intake questionnaire did not satisfy the requirements of an administrative charge. Yet, the *Dimas* Court went on to adopt the better reasoning of *Price v. Southwestern Bell Tel. Co.*, 687 F.2d 74 (5th Cir. 1982) and *Downes v. Volkswagen of America*, 41 F.3d 1132 (7th Cir. 1994) which held that an intake questionnaire, otherwise complete, can satisfy the requirements of an administrative charge.

E. Review of the Writ is Necessary

The above discussion clearly shows that the courts are divided on whether or not an intake questionnaire can be sufficient for purposes of complying with the charge-filing requirements of the EEOC in an ADEA claim. The better view is that an Intake Questionnaire that fully sets forth the names of the parties, the issues involved, and all other pertinent facts, does satisfy the charge-filing requirements of the EEOC in an ADEA claim. Accordingly, Petitioners urge this Court to grant their writ so the Court can review this important conflict among the Courts of Appeals.

II. REVIEW IS NECESSARY TO SET GUIDELINES FOR EMPLOYERS AND UNIONS WHEN FORCING EMPLOYEES TO SIGN WAIVERS THAT VIOLATES THEIR CONTRACTUAL RIGHTS.

The issue of "when is a waiver not a waiver" in the context of job related decisions is more involved than what may seem at first glance. What Petitioners seek by filing their writ is this Court's review of the standards applied by the Courts of Appeals in determining the parameters in deciding under what conditions a signed waiver is a coerced waiver when an employee's only choice is to violate the Collective Bargaining Agreement covering his employment rights or be placed on layoff status, without pay, until he is eligible for normal retirement, which would be within the next ten to fifteen years.

A. The Sixth Circuit's Position

The Sixth Circuit's position, which seems to be shared by all Circuits, is that it is almost impossible for a plaintiff to raise the defense of economic duress when signing a waiver of a job

related right. In the present case neither Petitioners nor Respondents, in their Circuit Court briefs, were able to cite a single Supreme Court Decision in support of their respective positions.

The principal court holding presented by Respondents' in their brief before the Sixth Circuit, on the issue of the waivers signed by Petitioners, was *Adams v. Phillip Morris, Inc.*, 67 F.3d 580, 583 (6th Cir. 1995), where the Court defined what it saw as the basis upon which to determine whether a waiver was "knowingly and voluntarily" executed. Here, the Court stated

> * In evaluating whether a release has been knowingly and voluntarily executed, we look to (1) plaintiffs experience, background, and education; (2) the amount of time the plaintiff had to consider whether to sign the waiver; including whether the employee had an opportunity to consult with a lawyer; (3) the clarity of the waiver; (4) consideration for the waiver; as well as (5) the totality of the circumstances. *See, e.g., Borman v. A.T.&T. Communications*, 875 F.2d 399 (2nd Cir.), *cert denied*, 493 U.S. 924 (1989); *Riley v. American Family Mutual Ins. Co.*, 881 F.2d 368 (7th Cir. 1989).

The problem with the *Adams* holding, and it is a major problem, is that neither the trial court, nor the Sixth Circuit, were able to explain what is meant by "the totality of the circumstances." If, in *Adams*, "the totality of the circumstances" means items one through four, then Petitioners are clearly out of business, as well as any other plaintiff who satisfies items one through four.

Petitioners conceded at the trial court and at the Court of Appeals that (1) they had the proper experience, background, and education to know what they were doing; that (2) they had time to consider the waiver and to consult with a lawyer; that (3) the language of the waiver was clear; and that (4) consideration was given for the waiver.

Nevertheless, Petitioners argue that the final phrase "as well as (5) the totality of the circumstances" means something other than what is listed in items one through four. To argue otherwise would be to argue that in *Adams*, the court was simply inserting words solely for the sake of writing without consideration to the meaning of the words. The phrase "the totality of the circumstances" has to mean that the court needs to consider other circumstances than what are listed in items one through four before deciding that a signed waiver was not signed under duress.

B. Cited case law.

In *Adams*, the principal case relied on by the trial court and the Sixth Circuit, plaintiff was offered a severance package "that included salary continuation, health insurance coverage for an extended time, and certain other benefits." *Adams*, 67 F.3d at 581. Adams exercised his free will and decided that rather than work he would accept the severance package and leave his employment.

But, Petitioners did not have the free will to choose to remain employed at Trenton. Their choice was to either violate their CBA rights and transfer 400 miles away, or violate their Pension rights by accepting early retirement, or be laid off without pay — which was tantamount to being discharged for the next ten to fifteen years since Petitioners ages ranged between 48 and 55.

In *Bormann v. AT&T Communications*, 875 F.2d 399 (2nd Cir. 1989) plaintiff was faced with the elimination of his managerial job and he chose to pick one of two termination payment options made available to him. Thus, he had a choice of one of two monetary payments during his layoff. Here, the Second Circuit found ". . . that although the district court did not explicitly use the 'totality of the circumstances' standard, its 'scrutiny of the circumstances surrounding the signing of the releases was adequate.' *Ibid*, 875 F.2d at 403. Therefore, the court held "there was no economic duress." *Ibid*, 875 F.2d at 403).

The problem with the Bormann decision is there was no indication by the court just what it meant by "the totality of the circumstances." Did the court mean the phrase "the totality of the circumstances" pertained to a review of all of the circumstances involved in items one through four, as described above? Or did the court mean there were other factors the trial court could have considered but it was not necessary since the trial court's "scrutiny of the circumstances surrounding the signing of the releases was adequate?" Hence, what was meant by the phrase "the totality of the circumstances" was not analyzed by the court.

C. Petitioners' option: sign the waivers or be fired. This falls under the totality of the circumstances which has never been considered by the Supreme Court

The law changes imperceptibly. Nevertheless, it does change to meet the needs of societal changes. It needs no citations to note that at one time in American history slavery was legal, but the law changed as society changed, thus making slavery illegal. The same goes for the freedom of speech. Petitioners refer to these important legal changes not to suggest their issue has the

same legal significance, but to simply point out, in a dramatic way, the evolution of the law.

Petitioners argue that there is no case in the judicial system that addresses the question of what is meant by "the totality of the circumstances. In Petitioners' case the trial court based its decision on the first four items defined in *Adams*. That is, Petitioners knew what they were doing, the waivers explained their rights, etc. But, as in all other cases the Petitioners are aware of, the trial court did not consider what Petitioners argued, which was "the totality of the circumstances."

To Petitioners, "the totality of the circumstances" meant that the trial court, and subsequently the Sixth Circuit, had to consider the factors affecting Petitioners other than their education, the time to consider the waiver, the clarity of the waiver, and consideration. Again, the problem is there are no guidelines from the Supreme Court regarding the phrase "the totality of the circumstances." Petitioners do not raise an academic argument. Rather, Petitioners argue that it is vital that the Supreme Court consider this matter since the American economy is undergoing a massive restructuring that is affecting hundreds of thousands of employees.

In the present case the Sixth Circuit held there was no economic duress since the Petitioners met the four factors earlier described. Accordingly, the Sixth Circuit did not consider Petitioners' argument that their case fell under "the totality of the circumstances." The Court followed the trial court in applying the *Adams* standard. (Appx. C at 37a)

Petitioners argue that "economic duress" falls under the rubric "the totality of the circumstances." While there are undoubtedly numerous ways that economic duress can manifest

itself, in Petitioners' case the economic duress was if they did not sign a waiver they would be laid off, which was the same as a discharge.

Each Petitioner was in his prime of working life. Figuratively speaking, the employer and the union placed a gun to the head of each Petitioner and said "either violate your CBA rights or you will be discharged." That is economic coercion falling under the heading "the totality of the circumstances."

D. The need to grant the writ.

Petitioners do not seek review of their writ for a determination of whether the facts of their case warrant a finding of "economic duress." That type of finding is for the trial and appellate courts. Petitioners' writ seeks something else.

Petitioners' argument for granting their writ is based on the need to develop case law at the trial court level on just what constitutes "the totality of the circumstances." Just what do the lower courts mean by "the totality of the circumstances?" Petitioners argue that this phrase includes the facts of their case independent of the previously discussed four factors. Petitioners should have been able to develop this argument at the trial court, but their case was summarily dismissed.

As important as Petitioners' case is to them, they nevertheless argue that what is at stake is more than their personal issues. What is primarily at stake is a body of law defining, at least in general terms, what is meant by "the totality of the circumstances" and whether "economic duress" falls under this phrase independently of the usual considerations of knowledge and education, time to consider the waiver, clarity of the waiver, and consideration for the waiver.

Petitioners seek a grant of their writ in order to present to this Court, in detailed fashion, why this case should be remanded to the lower court so a record can be developed on what is meant by "the totality of the circumstances" and whether a claim of "economic duress" falls under the totality of the circumstances.

CONCLUSION

For all the foregoing reasons, Petitioners respectfully request that the Supreme Court grant review of this matter.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT FILED APRIL 28, 2005

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Nos. 04-1094, 04-1121

WILLIAM R. DORN, et al.,

Plaintiffs-Appellants,

v.

GENERAL MOTORS CORP., et al.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

OPINION

BEFORE: COLE and GIBBONS, Circuit Judges; and SCHWARZER,* Senior District Judge.

WILLIAM W SCHWARZER, Senior District Judge. Appellants William R. Dorn and twenty-one other plaintiffs (collectively, plaintiffs) appeal the judgment of the district

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* The Honorable William W Schwarzer, Senior United States District Judge for the Northern District of California, sitting by designation.

court in granting the motions to dismiss and for summary judgment of defendants General Motors Corp. (GM) and Delphi Automotive Systems (Delphi or, with GM, GM/Delphi) and the International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (UAW), in two related actions arising out of the 1998 closure of a GM plant in Trenton, New Jersey. The district court had jurisdiction over one of Dorn's actions under § 301 of the Labor Management Relations Act (LMRA), 29 U.S.C. § 185, and over the other, which asserted violations of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-634, under 28 U.S.C. § 1331. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

BACKGROUND

In 1998 GM began winding down operations at its Delphi manufacturing facility in Trenton, New Jersey, where all of the twenty-two original plaintiffs in these actions were then employed. The plaintiffs were represented by the UAW and covered by a collective bargaining agreement (CBA) that placed them in "protected status" for a time following the closure of the facility. In 1999 GM spun off its Delphi division, and the plaintiffs, still represented by the UAW, became employees of Delphi.

In late 2000 the UAW and Delphi entered into a "special attrition plan" (plan or SAP). This provided for various retirement, early retirement, and transfer options, with severance bonuses, for employees in plaintiffs' situation. The employees were to select an option and could receive the related bonus upon signing an agreement containing a clause

(the Release) waiving all legal claims against defendants, including claims under the ADEA and/or connected with the changes in plaintiffs' employment.[1] Employees who did not select an option and sign an agreement would not receive a bonus and would be transferred to other facilities of Delphi's choosing. Plaintiffs believed the options offered them constituted a breach of plaintiffs' CBA and were also less favorable than those offered younger employees.

A number of Delphi employees collectively filed a grievance with the UAW over the SAP on November 15, 2000. On December 1, 2000, however, the UAW's GM representative met publicly with Delphi employees to tell them that the UAW was in agreement with GM and Delphi

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1. The Release reads in pertinent part:

> In consideration for participation in the Special Attrition Plan, I . . . hereby release and forever discharge Delphi, General Motors Corporation, the UAW, and their respective officers . . . from all claims, demands and causes of action, . . . which I may have related to my employment or the cessation of my employment with or denial of any employee benefit by Delphi. This release specifically includes, without limitation, a release of any claims I may now have under . . . the Age Discrimination in Employment Act; . . . and any other federal, state, or local laws or regulations, or any common law actions relating to employment or employment discrimination. . . . I further agree not to institute any proceedings against Delphi, the UAW, or its officers . . . related to my employment, cessation of my employment, or the denial of any employee benefit. . . . I acknowledge I have been given a period of forty-five (45) days to review and consider this agreement before signing it.

concerning the plant closure and the SAP. After this point, the record does not indicate that any employee further pursued internal union remedies in connection with the spin-off of Delphi, the closure of the Trenton facility, or the SAP.

By January 2001 all of the plaintiffs but one, James Zeek, had signed agreements containing the Release. But plaintiffs had known of the SAP's terms by November 2000 at the latest. Near the end of November 2000 one of the plaintiffs called the Equal Employment Opportunity Commission (EEOC) to inquire about filing a charge of age discrimination against the defendants based on the SAP. On November 28, 2000, the EEOC mailed the plaintiffs a letter acknowledging their inquiry and a questionnaire. The letter included the following printed information: "**In order for the EEOC to have jurisdiction to investigate any complaint, a charge of discrimination *must be filed within 300 calendar days of the alleged violation.*** It is your responsibility to insure that your charge of discrimination is filed in a timely manner." Plaintiffs returned the completed questionnaire to the EEOC on January 10, 2001. Plaintiff Dorn claimed in an affidavit to have had numerous telephone conversations with EEOC officers in mid- to late 2001. It was not until December 19, 2001, however, that Dorn signed EEOC charges against Delphi and the UAW. Dorn signed an amended charging sheet in February 2002. At no time did plaintiffs file charges against GM with the EEOC. The EEOC issued the plaintiffs a right to sue letter on March 13, 2003.

Meanwhile, in March 2002 plaintiffs had commenced an action in federal district court, asserting against Delphi and GM a claim of breach of the CBA and against the UAW a claim of breach of the union's duty of fair representation

under § 301 of the LMRA, 29 U.S.C. § 185.[2] This action was the basis for appeal No. 04-1121. In December 2002 the district court found that the claims of all of the plaintiffs except Zeek were barred by the Release and dismissed the case as to those plaintiffs. It permitted Zeek's § 301 claims to go forward.

In June 2003 the same twenty-two plaintiffs initiated a second action against the same defendants, asserting violations of the ADEA; this case was assigned to the same judge as the first action and forms the basis for appeal No. 04-1094. In December 2003 the district court granted defendants' motions to dismiss on the grounds that as to twenty-one plaintiffs, the Release barred the discrimination action and that at any rate plaintiffs had failed to exhaust their administrative remedies by failing to file timely charges with the EEOC.[3] At the same time, the district court granted defendants' motion for summary judgment against Zeek in the § 301 action, on the grounds that Zeek had failed to exhaust his internal union remedies and had failed to raise a genuine issue of material fact as to breach by any defendant. Plaintiffs timely appealed the district court's judgments, and the appeals were consolidated for argument.

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2. In this action plaintiffs also asserted claims under the Thirteenth Amendment of the United States Constitution, 42 U.S.C. § 1981, and state law. The district court's dismissal of these claims is not at issue in this appeal.

3. The latter basis for dismissal served to dismiss Zeek's ADEA claim as well. Also, none of the plaintiffs filed any charge with the EEOC at any time against GM. Accordingly, the district court dismissed plaintiffs' ADEA claims against GM on this basis rather than on the ground of timeliness.

Appendix A

STANDARD OF REVIEW

We review de novo a district court's dismissal for failure to state a claim. *Penny/Ohlmann/Nieman, Inc., v. Miami Valley Pension Corp.*, 399 F.3d 692, 697 (6th Cir.2005). We also review de novo a district court's grant of summary judgment. *Kalamazoo Acquisitions, LLP v. Westfield Ins. Co., Inc.*, 395 F.3d 338, 341 (6th Cir.2005).

DISCUSSION

Plaintiffs argue that the Release forming part of the basis for the district court's dismissal of both their ADEA and § 301 actions is invalid because it was executed under duress. With respect to the district court's grant of summary judgment to Zeek on his § 301 claims, they contend that resort to the grievance procedure would have been futile and also that the court considered the evidence under an erroneous standard. They also argue that their ADEA action is not time-barred because (1) the 300-day filing requirement should have been equitably tolled in their case, since the EEOC led them to believe their charges were timely and/or (2) the district court erred in rejecting the "finding" of timeliness implied by the EEOC's right to sue letter.

I. VALIDITY OF RELEASE

The district court found all of the plaintiffs' claims in both actions, except those of Zeek, to be barred by the Release they signed.[4] Plaintiffs contend on appeal that the Release

4. The district court may have erred in dismissing plaintiffs' § 301 action on the basis of the Release under Rule 12. The defendants attached a copy of the Release to their motion to dismiss, but the (Cont'd)

(Cont'd)
plaintiffs had not referred to the Release in their complaint. A motion to dismiss relying on a paper outside the pleadings is generally permissible only where the complaint refers to that paper. *Weiner v. Klais & Co., Inc.*, 108 F.3d 86, 89 (6th Cir.1997) (recognizing dismissal as proper when based on "those exhibits submitted by [a] defendant which can properly be considered as incorporated by reference into the complaint"); *see also City of Monroe Employees Ret. Sys. v. Bridgestone Corp.*, 399 F.3d 651, 659 n. 6 (6th Cir.2005) (permitting papers submitted with motion to dismiss to be considered part of pleadings "if they are referred to in the plaintiff's complaint and are central to the plaintiff's claim") (citation omitted). The purpose of this rule is clearly to avoid unfair surprise and prejudice. *Cf. Yeary v. Goodwill Industries-Knoxville, Inc.*, 107 F.3d 443, 445 (6th Cir.1997) (noting that where "the defendants had ample opportunity to respond to the plaintiff's affidavits" and "cannot be said [to have] suffered any prejudicial surprise," Court of Appeals need not view motion to dismiss as converted into motion for summary judgment); *United Bhd. of Carpenters & Joiners of Am. v. Ohio Carpenters Health & Welfare Fund*, 926 F.2d 550, 558 (6th Cir.1991) (noting that where "one party is likely to be surprised by the change [from motion to dismiss from motion to summary judgment,] notice is required").

In this case, by basing its order on the Release, the district court may have effectively converted the defendants' motion to dismiss to a motion for summary judgment without stating that it was doing so. But given subsequent developments in the litigation, this error caused plaintiffs no prejudice. Plaintiffs later moved to set aside the court's order of dismissal, and the court considered this motion together with defendants' motion for summary judgment with respect to plaintiff Zeek in the § 301 action. Some discovery preceded these motions. The court denied plaintiffs' motion and granted defendants' in the same order of December 12, 2003. Thus, plaintiffs had an opportunity to counter the contentions the defendants made in

(Cont'd)

was void because they signed it under duress.[5] The theory of economic duress on which they rely has, however, been expressly rejected by this court, and they offer no compelling reason for us to depart from that precedent.

Plaintiffs acknowledge that we set forth the framework for assessing the voluntariness of releases of claims in *Adams v. Philip Morris,* 67 F.3d 580 (6th Cir.1995). Under that standard,

> In evaluating whether a release has been knowingly and voluntarily executed, we look to (1) plaintiff's experience, background, and education; (2) the amount of time the plaintiff had to consider whether to sign the waiver, including whether the employee had an opportunity to consult with a lawyer; (3) the clarity of the waiver; (4) consideration for the waiver; as well as (5) the totality of the circumstances.

Id. at 583 (citations omitted). Plaintiffs also concede that they do not contest the validity of the Release on any of the

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(Cont'd)

connection with their original motion to dismiss based on the Release, so the district court's failure to convert its initial dismissal into a summary judgment was harmless. *Cf. Yeary,* 107 F.3d at 445. Further, plaintiffs' counsel admitted at oral argument that the other plaintiffs' claims were effectively identical to Zeek's.

5. Plaintiffs also contend that the release could not bar their ADEA claim because it did not comply with the Older Workers Protection Act, 29 U.S.C. § 626(f). We need not discuss this argument because the discussion in Part III is dispositive of the ADEA claim.

first four grounds noted in *Adams*. They argue only that under the "totality of the circumstances," they must be understood to have been coerced into signing the Release, because they were forced to choose between signing it and simply being fired without benefits.

The Sixth Circuit considered and rejected a nearly identical argument in *Adams*, noting that although the plaintiff in that case "certainly felt some economic pressure to accept the attractive severance package and settle any claims he might have against [his employer,] this pressure does not rise to the level of economic duress" invalidating the waiver. *Id.* Plaintiffs do not contend that the unattractive choice they were forced to make imposed any pressure other than economic pressure on them. Their argument is thus foreclosed by *Adams*.

Plaintiffs' argument focuses solely on the unattractiveness of the choice with which they were presented. They do not offer this court any clear reasons either to distinguish the facts in their case from those in *Adams* or to depart from the conclusion we reached in that case. Good reasons exist to continue to recognize the standard set in *Adams;* recognizing economic duress in situations like those in *Adams* and the present case would invalidate most, if not all, releases of claims in agreements conferring severance benefits on employees. *See Parker v. Key Plastics, Inc.*, 68 F.Supp.2d 818, 827 (E.D.Mich.1999) ("[I]f such pressure were deemed sufficient to overcome an otherwise knowing and voluntary release, it is difficult to imagine a case in which a release signed in exchange for reinstatement would ever be enforceable. In such cases, it can generally be assumed

that the employee feels economic pressure to settle."). For this reason, we decline to depart from the standard set in *Adams*, conclude that the Releases were valid and enforceable, and accordingly affirm the district court's reliance on them in dismissing the claims of the twenty-one plaintiffs who signed the Release in both actions.

II. SUMMARY JUDGMENT ON ZEEK'S CLAIMS

Plaintiff Zeek did not sign a Release, so his claims were not contractually barred. Instead, the district court granted defendants' motion for summary judgment with respect to Zeek's § 301 claims on the grounds that he failed to exhaust internal grievance procedures, *see Monroe v. Int'l Union, UAW*, 723 F.2d 22, 24 (6th Cir.1983), and that his lawsuit was filed outside the six-month statute of limitations on § 301 claims, *see DelCostello v. IBT*, 462 U.S. 151, 169-71 (1983). The district court also found that Zeek had failed to raise any genuine issue of material fact with respect to a breach of the CBA.

On appeal, Zeek concedes that he did not personally file a grievance or attempt to appeal the grievance filed on his behalf and withdrawn in late 2000. He maintains instead that this failure is excused because his pursuit of internal remedies would have been futile, "since any appeal would have taken at least six years." While failure to exhaust internal remedies may be excused where attempts to exhaust would be futile, a plaintiff cannot invoke this excuse in a conclusory fashion, but must present facts supporting the claim of futility. *Willetts v. Ford Motor Co.*, 583 F.2d 852, 856 (6th Cir.1978). Zeek presents no such facts, only assertions of futility in his

response to defendants' motion for summary judgment and in an affidavit from Dorn expressing "belief" that a complete appeal would take "about six years." This is insufficient to show that resort to the internal grievance and appeals process would have been futile for Zeek.

Zeek also argues, somewhat inconsistently, that his action was timely because to his knowledge the internal grievance was still pending as of the time plaintiffs filed the § 301 action. The six-month limitations period for challenging a union's action under § 301 begins running when a union takes an "unequivocal position" that it will not pursue an employee's claim against the employer. *Glass, Molders, Pottery, Plastics & Allied Workers Local 421 v. A-CMI Mich. Casting Ctr.*, 191 F.3d 764, 767 (6th Cir.1999). In the present case, the UAW's GM representative publicly informed Delphi employees on December 1, 2000, that the union did not object to the Delphi spin-off, the Trenton facility closure, or the SAP. As of this date, Zeek reasonably should have known of the union's unequivocal position regarding the plant closure and SAP. *See Chrysler Workers Ass'n v. Chrysler Corp.*, 834 F.2d 573, 579-81 (6th Cir.1987) (holding that a "knew or should have known" standard applies to triggering of statute of limitations for action against union in hybrid § 301 action). The plaintiffs did not file their § 301 action until March 2002, at least fourteen months after this date. The district court therefore did not err in concluding that the action was untimely filed.

Zeek also contends on appeal that he did raise an issue of genuine fact concerning the UAW's breach of its duty of fair representation. Zeek's entire § 301 claim was based on

the contention that the closure of the Delphi facility and the terms of the SAP violated the terms of the CBAs between the UAW and GM/Delphi. The district court held that Zeek had not shown how these CBAs precluded the union's renegotiation of a separate agreement connected with plant closure. While Zeek contends that "neither Delphi no[r] the UAW ever produced any . . . document" indicating that they had the authority to negotiate such a closure agreement, in a duty of fair representation claim the plaintiff has the burden of showing that the union's actions have been arbitrary, discriminatory, or in bad faith. *Vaca v. Sipes,* 386 U.S. 171, 190-91 (1967). Defendants brought forth evidence that the Delphi-UAW CBA contained provisions contemplating renegotiation; to survive summary judgment Zeek was required then to produce facts countering this evidence. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323-24 (1986). Zeek did not do this, but in his response to defendants' motion merely reiterated his allegations that the SPA had violated the CBA. The district court did not err in holding that Zeek had not carried his burden and in granting defendants' summary judgment motion on this basis.

III. CHARGE FILING WITH THE EEOC

As noted, in addition to finding that the Releases barred the ADEA action of the plaintiffs who had signed them, the district court concluded that the action was barred as to all of the plaintiffs by the 300-day charge filing requirement on ADEA claims.[6] It is undisputed that plaintiffs filed no formal

6. Plaintiffs appear to argue that the district court erred in making this determination within the framework of a motion to (Cont'd)

charge with the EEOC until December 2001[7] and that this date was well beyond the 300-day limit. On appeal, however, plaintiffs argue that the court should have found the statute's time limitation equitably tolled, since following their initial inquiry the EEOC led them to believe either that they had

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(Cont'd)

dismiss rather than a summary judgment framework. But they do not point out how they were prejudiced by any such error. For the reasons discussed above, then, we need not treat the dismissal as a grant of summary judgment or reexamine the materials at issue under a different proof standard.

Plaintiffs also argue that the district court erred in finding that Zeek did not file a complaint with the EEOC, pointing out that his name appears on the questionnaire submitted in January 2001. Plaintiffs misrepresent the district court's finding, which was that Zeek "never filed a charge of discrimination against the defendant." The questionnaire was not a formal charge of discrimination within the meaning of the ADEA. *See* 29 U.S.C. § 626(d); 29 C.F.R. § 1626.3; *Diez v. Minn. Mining & Mfg. Co.*, 88 F.3d 672, 677 (8th Cir.1996).

7. Plaintiffs do argue that the district court should have construed their November 2000 inquiry and January 2001 submission of a questionnaire as the equivalents of a formal charge. However, the statutory language requiring a formal charge, not simply an inquiry or complaint, is clear. *See* 29 U.S.C. § 626(d). So was the language on the letter plaintiffs received in November 2000, which informed them of the 300-day charge filing limit. And the fact that plaintiffs subsequently filed a formal charge indicates that they understood the difference between a complaint and a formal charge. *See Diez*, 88 F.3d at 677 ("The fact that Diez later filled out a formal charge indicates that he understood the [EEOC] questionnaire to be preliminary.").

filed a timely charge or that it would file a timely charge on their behalf. In the alternative, they argue that the district court erred in rejecting the "finding" of timeliness contained in the EEOC's right to sue letter. Neither argument has merit.

The 300-day charge filing limit is a statutory requirement. 29 U.S.C. § 626(d)(2). A district court may, however, in its discretion equitably toll the running of this period. *Weigel v. Baptist Hosp.*, 302 F.3d 367, 376 (6th Cir.2002). We have held that a court should consider five factors in determining whether to toll the requirement: "1) lack of notice of the filing requirement; 2) lack of constructive knowledge of the filing requirement; 3) diligence in pursuing [the plaintiff's] rights; 4) absence of prejudice to the defendant; and 5) the plaintiff's reasonableness in remaining ignorant of the particular legal requirement." *Id.* Plaintiffs argue that the EEOC's failure to inform them that their December 2001 charge was untimely constitutes a lack of notice regarding the filing requirement, mandating equitable tolling. The district court did not abuse its discretion in rejecting this argument on the basis of the materials the EEOC sent plaintiffs in November 2000. The questionnaire does not purport to identify itself as a charging document. To the contrary, the questionnaire states that "[i]f a charge is filed, the [EEOC] will attempt to settle your case." And the letter clearly informed plaintiffs that it was their responsibility to ensure that the 300-day requirement was met. Nothing prevented plaintiffs from following these

Nor did the district court err in failing to adopt as establishing a timely filing the EEOC's issuance of a right to sue letter. This form letter contains no statement that the EEOC found the plaintiffs' charge timely nor any guarantee

that a court action based on the charge would be found timely. Even if it had contained such a statement, the district court is not bound by EEOC determinations. *See Williams v. Nashville Network,* 132 F.3d 1123, 1129 (6th Cir.1997) (finding "no abuse of discretion in the district court's decision to exclude [an] EEOC letter" from evidence where there was "little if any basis for the district court to conclude that the report had any probative value"); *see also EEOC v. Ford Motor Co.,* 1996 WL 557800, at *12 (6th Cir. Sept. 30, 1996) (unpublished) (holding that "a district court does not err as a matter of law by categorically refusing to admit EEOC cause determinations in either bench and [sic] jury trials"). The district court was not required to consider the EEOC letter relevant to the question of the timeliness of plaintiffs' charge. It did not err in finding that charge untimely.

CONCLUSION

For the foregoing reasons, the judgments of the district court dismissing in part plaintiffs' claims and granting defendants' motion for summary judgment are **AFFIRMED**.

APPENDIX B — ORDER DENYING PLAINTIFFS' MOTION TO SET ASIDE ORDER OF DISMISSAL AND ORDER GRANTING DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION DATED DECEMBER 12, 2003

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Civil Action No.
02-CV-70956-DT

HON. BERNARD A. FRIEDMAN

WILLIAM R. DORN, et al.,

Plaintiffs,

vs.

GENERAL MOTORS, et al.,

Defendants.

ORDER DENYING PLAINTIFFS' MOTION TO SET ASIDE ORDER OF DISMISSAL

and

ORDER GRANTING DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

Appendix B

On December 10, 2003, this matter came before the court on (1) plaintiffs' motion to set aside order of dismissal, (2) the motion of defendants General Motors Corp. and Delphi Automotive Systems for summary judgment as to plaintiff Zeek, and (3) the motion of defendant UAW for summary judgment as to plaintiff Zeek. A hearing was held and oral argument heard. For the reasons stated on the record,

IT IS ORDERED that plaintiffs' motion to set aside order of dismissal is denied.

IT IS FURTHER ORDERED that the motion of defendant UAW for summary judgment as to plaintiff Zeek is granted.

IT IS FURTHER ORDERED that the motion of defendants General Motors Corp. and Delphi Automotive Systems for summary judgment as to plaintiff Zeek is granted.

Dated: December 12, 2003
Detroit, Michigan

s/ Bernard A. Friedman
BERNARD A. FRIEDMAN
UNITED STATES DISTRICT JUDGE

Appendix B

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case Numbers:
02-70956
03-72246

WILLIAM R. DORN, et al.,

Plaintiffs,

-vs-

GENERAL MOTORS CORPORATION, et al.,

Defendants.

MOTIONS
BEFORE THE HONORABLE
BERNARD A. FRIEDMAN
WEDNESDAY, DECEMBER 10TH, 2003

THE CLERK: Calling case number 02-70956, Dorn versus General Motors Corporation, and case number 03-72246, Dorn versus General Motors Corporation.

THE COURT: Good afternoon, may we have appearances, please, for the record?

MR. DUNNE: Good afternoon, your Honor. Harold Dunne, counsel for the plaintiffs.

Appendix B

MR. KING: Your Honor, Roger King for Delphi Corporation and General Motors Corporation.

MR. DOSKO: And I'm Jeffrey Dosko for the UAW.

THE COURT: Thank you.

Okay, we have Plaintiffs' Motion to Set Aside the Order of Dismissal; the Defendants' Motion for Summary Judgment both on 02-70956, both Delphi, General Motors and UAW. And then the two Motions to Dismiss on case number 72246 by General Motors, Delphi and UAW.

Where do you want to start? Let's start with the Motion to Set Aside the Order of Dismissal.

Plaintiff, anything you want to add that you have not argued before in your brief or anything?

MR. DUNNE: Just very briefly, your Honor.

You've read the brief. The only thing if can just take a moment or two to reiterate that according to the deposition transcripts, General Motors did not sign any agreement with Delphi, nor did the UAW sign an agreement with Delphi authorizing Delphi to prevent any negotiations with the plaintiffs. Their names were included, of course, as in the waiver that plaintiff signed with Delphi. I do not believe that document, that waiver with Delphi, binds GM and the UAW with any waiver with the plaintiff.

That's the substance of our case. Our argument is in the brief, your Honor.

THE COURT: Okay. Mr. King?

MR. KING: No, your Honor. I think we've covered it.

THE COURT: Okay. In this matter the Court is going to deny the motion for the following reasons: Number one, is -- in effect what it is, is a Motion for Reconsideration. A Motion for Reconsideration has to be filed within ten days of the Court's ruling, in this case by December of 2002. The plaintiffs missed that deadline by about seven and a half months.

Also there's no newly discovered evidence, no change of law, nothing. Everything was pretty much raised in the prior argument and motion to the Court.

Third, the plaintiffs' argument is simply wrong on its merits, although Delphi is the only defendant that signed the releases, it does not mean that the other defendants are unprotected. The cases cited by the defendants which really are unchallenged by the plaintiffs indicates that General Motors and the UAW are third-party beneficiaries since plaintiffs specifically agreed not to sue them. In fact, this one even goes further than most of the cases though because in this particular case they, themselves, are named in the release though they didn't sign it. Most of the cases they talked about third-party beneficiaries, the parties aren't even mentioned by name, but are by third-party beneficiaries. Here, both parties are specifically named and very clearly named.

So the Court for that reason and for all the other reasons will deny the Plaintiffs' Motion to Set Aside the Dismissal.

Okay, now we have General Motors' motion and Delphi's for Summary Judgment.

Anything you want to add or subtract, or argue or -- I've read everything, and have a pretty good grasp of the UAW or --

MR. DOSKO: I think everything for the UAW is correct in our papers so I don't think we need to add anything.

MR. KING: Same, your Honor, for General Motors.

THE COURT: Plaintiff, anything you want to add that you haven't argued in your papers, or anything you want to highlight?

MR. DUNNE: You're referring to what, to Defendants' Motion to Dismiss Mr. Zeek from the lawsuit?

THE COURT: No, I'm talking about right now their Motion for Summary Judgment as to -- yes, as to Zeek -- correct.

MR. DUNNE: I have nothing to add to what's already been filed.

THE COURT: The Court is going to grant the Motion for Summary Judgment for the defendants as to Plaintiff Zeek's claims for both procedural as well as substantive reasons.

Appendix B

Number one, plaintiffs never attempted to use the UAW's internal appeals procedure, Article 33 of the UAW constitution, which the Court believes is a prerequisite to bringing any 301 hybrid claim.

Plaintiffs argue that you should excuse this failure, but offers no convincing reason to do so. He has not shown that union officials are hostile toward him, that the appeals procedure and process could not be offered -- could not give him any relief, or offer any kind of relief that he sought, or that the delay in processing the appeal would have been any different in that which took place in this case.

Additionally, Summary Judgment is appropriate based on plaintiff's failure to commence suit within the six-month limitation period. Plaintiff's cause of action occurred when he knew or should have known that the UAW would not pursue the 11-15-00 Service group grievance. Plaintiff has knowledge that he came to this conclusion at the 12-6-00 meeting with Richard Ruppert, the UAW Assistant Director, who came to the Trenton plant that day to explain the early retirement and transfer options under the special attrition plan that had been negotiated with Delphi.

Plaintiff should have filed suit within six months of that date, by June 6th of 2001, yet he did not actually file suit until March of 2002, missing the statute by more than nine months.

On the merits, plaintiff cannot show that either General Motors or Delphi breached their respective collective bargaining agreements, or that the UAW breached its duty

of fair representation. Plaintiff appears to have abandoned his claim that GM breached the collective bargaining agreement by spinning off Delphi. He focuses on Delphi's alleged breach forcing him to take a job that is more than fifty miles away from Trenton. However, he has no convincing response to Delphi's and the UAW's argument that the collective bargaining agreement allowed them to negotiate a separate agreement in the event of a plant closing. The UAW clearly, on this record, did not arbitrarily, capriciously, or in bad faith negotiate a special attrition package which allowed the plaintiff to have another skilled job at another Delphi plant, and to keep his same salary and benefits, and pocket the ninety-three dollars in relocation benefits.

Therefore, the Court will, as I've indicated grant the motion.

Okay, I think the only thing left is the 72246 case, the alleged age discrimination, the Motion to Dismiss.

Any additional arguments, defense since it's your motion.

MR. KING: No, your Honor. I think we have briefed the matter quite exhaustively.

THE COURT: I think so.

MR. DOSKO: Nothing to add, your Honor.

THE COURT: Plaintiff, anything else you'd like to add?

MR. DUNNE: Nothing to add, your Honor.

THE COURT: Okay. Again, the Court is going to grant the Motion to Dismiss. Twenty-one of the twenty-two plaintiffs signed the release so that should be the end of the road and is the end of the road.

As to Zeek's case against GM, it fails because he never filed a charge of discrimination against the defendant. Actually, Zeek never filed anything at any time. He is relying upon the efforts of Robert Ryan, who made the initial telephone contact with the EEOC, and William Dorn, who filled out the questionnaire and signed the actual charges. However, co-plaintiff Dorn filed a charge against Delphi and another charge against UAW in December of 2001, but these were filed more than three hundred days after the plaintiff knew of the alleged discrimination. The filing of a timely EEOC charge is a prerequisite to suit, and plaintiff just simply missed the filing deadline.

The Court doesn't have to go any further than that because I think all the cases that have interpreted that, interpreted that you have to do it. He missed the deadline, substantially missed the deadline; therefore, there's no cause of action and the Motion to Dismiss is granted.

Okay, anything else that I have not included that should be included?

MR. KING: No, your Honor.

MR. DOSKO: Nothing from the Union.

MR. DUNNE: Nothing from the plaintiffs.

THE COURT: A lot of paperwork done in this case.

As I said, each side briefed it; did a nice job.

It was pretty clear.

Okay, thank you.

MR. DUNNE: Thank you.

MR. KING: Thank you, your Honor.

MR. DOSKO: Thank you, your Honor.

(Proceedings concluded.)

APPENDIX C — ORDER GRANTING DEFENDANTS' MOTIONS FOR PARTIAL DISMISSAL OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION DATED DECEMBER 12, 2002

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Civil Action No.
02-CV-70956-DT

HON. BERNARD A. FRIEDMAN

WILLIAM DORN, et al.,

Plaintiffs,

vs.

GENERAL MOTORS CORP., et al.,

Defendants.

ORDER GRANTING DEFENDANTS' MOTIONS FOR PARTIAL DISMISSAL

On December 11, 2002, this matter came before the court on (1) the motion of defendants General Motors Corporation and Delphi Corporation to dismiss, and (2) the motion of defendant UAW to dismiss. A hearing was held and oral argument heard. For the reasons stated on the record,

IT IS ORDERED that both defense motions are granted. The complaint is dismissed in its entirety as to all plaintiffs except James Zeek.

IT IS FURTHER ORDERED that the case shall proceed only as to plaintiff James Zeek and only as to the claims asserted in Counts I, II, III, IV and V (i.e., not as to the claims for intentional interference with contract or under thirteenth Amendment, which are dismissed).

Dated: December 12, 2002
Detroit, Michigan

s/ Bernard A. Friedman
BERNARD A. FRIEDMAN
UNITED STATES DISTRICT JUDGE

Appendix C

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case Number:
02- CV 70956

WILLIAM R. DORN, et al.,

Plaintiffs,

-v-

GENERAL MOTORS CORPORATION, DELPHI AUTOMOTIVE SYSTEMS, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, INTERNATIONAL UNION (UAW),

Defendants.

DEFENDANTS' MOTION TO DISMISS
BEFORE THE HONORABLE
BERNARD A. FRIEDMAN
WEDNESDAY, DECEMBER 11, 2002

THE CLERK: Calling case number 02-70956, Dorn versus General Motors.

MR. KING: Ready, your Honor.

THE COURT: May we have appearances, please?

MR. KING: Yes, your Honor, Roger King, on behalf of defendants, General Motors Corporation and Delphi Corporation.

MR. ROSSMAN: Michael Rossman, for the same parties.

THE COURT: Thank you.

MR. DUNNE: Harold Dunne, counsel for the plaintiffs, your Honor.

MR. WERTHEIMER: William Wertheimer, your Honor, representing the UAW, and I am here only to move for the admission of Jeff Sodko as attorney for the UAW in this case.

THE COURT: Does he have his little card here?

MR. WERTHEIMER: He has submitted --

MR. SODKO: Yes. It's already been filed with the Clerk, Judge.

THE COURT: I mean that little card.

MR. SODKO: I think that card is in the Clerk's Office We returned the card by mail to the Clerk about two months.

THE COURT: When you get a chance, pick it up, and I'll be here. Come on down and I'll swear you in.

In fact, let me swear you in right now and then I'll sign it.

MR. SODKO: Okay. I'm sorry.

THE COURT: No problem. They won't accept it unless I sign it.

MR. KING: Your Honor, pardon me for interjecting, Mr. Rossman and I are in the exact same situation. It would be economical to the swearing in, we would be pleased to join.

THE COURT: Oh, yes. Good, we'll get you all sworn in at the same time. And then if you can get your cards and just bring them down, I'll sign them. They won't process them until it's signed, and I'd be delighted to do so.

Why don't each of you raise your right hand?

Do each of you solemnly swear or affirm that you'll demean yourself as an attorney and counselor of this court uprightly and according to law, and you'll support the Constitution of the United States so help you God?

MR. KING: Yes.

MR. ROSSMAN: Yes.

MR. SODKO: Yes.

Appendix C

THE COURT: Let the record reflect we have all yeses.

Okay, we have the motion of the defendants to dismiss.

MR. KING: Yes, your Honor.

THE COURT: You may proceed.

You can argue, do whatever you want. We have lots of time. You can highlight anything you want. I've read everything so --

MR. KING: Certainly, your Honor. I would normally reserve rebuttal time. I'm not sure that's appropriate given the motion practice today --

THE COURT: It's okay. You have some time, and I've heard -- you've spent some time and effort and so forth getting here.

I schedule oral argument on all my motions just about because when I practiced law, I thought it was an important thing to at least be able to argue in case something else came up or something of that nature. But oftentimes I need a little argument, but I have nothing but time.

MR. KING: We appreciate your time --

THE COURT: Pardon?

MR. KING: We appreciate your time for being here.

We will indulge the Court just very briefly.

THE COURT: Great.

MR. KING: As I said before, your Honor, my name is Roger King. I appear here on behalf of defendants General Motors Corporation and the Delphi Corporation.

And, your Honor, I know you are well acquainted with the papers in this case, but just to peel it away, this is a release case. We are here under 12(b)(1) and 12 (b) (6). And it's our position that the releases are dispositive. This case is a non-starter, I would submit, your Honor, because of the releases. They meet this court's standard, and certainly the Sixth Circuit standard. And I would submit that the *Parker* case, the case out of this court, Judge Rosen's court, clearly puts this case in perspective. These releases are known. They're voluntary. The signatories to the releases have forty-five days so they could take up to forty-five days. There was a seven-day revocation period. I know you've seen the releases. Claims have the language. Furthermore, the parties to the releases were strongly suggested to at least consult an attorney if they had any questions whatsoever.

So I believe that the releases as submitted meet all of the standards of the Sixth Circuit. They are knowing, they're voluntary, there ought not to be any question.

The only question that we could discern from opposing papers was this duress argument. And, again, I believe the *Parker* case really nails that issue.

Appendix C

As you're well aware in the *Parker* case, the *Adams* case and numerous other authorities before you, economic duress is not sufficient. And I think it's quite interesting, just one quote from *Parker*, 818 of 68 F.Supp,

> "However, if such pressure, i.e, economic pressure, were deemed sufficient to overcome an otherwise knowing and voluntary release, it is difficult to imagine a case in which a release signed in exchange for reinstatement would ever be enforceable."

It speaks for itself.

But the second issue, if there is an issue would be preemption, that would be in the alternative. Clearly the arguments that the plaintiff -- or plaintiffs are advancing here require an interpretation of various collective bargaining agreements, and memoranda of understanding.

THE COURT: Let's do the release first and then we can talk about the other --

MR. KING: Right.

THE COURT: Because even with the release if I should rule in your favor we still have the Jim Zeek or James Zeek --

MR. KING: We do, your Honor.

THE COURT: So let's deal with all those other issues after -- not after, as the second issue.

MR. KING: And, Mr. Zeek in his affidavit as the Court is well aware said he never signed a release. And, your Honor, to date we have not been able to find a release. We believe it exists, but we can't find it.

So the 12 (b) motion cannot be -- we have to concede that.

THE COURT: So we're talking as the release, everybody but Mr. Zeek.

MR. KING: Yes, your Honor.

THE COURT: Let's see what the plaintiff has to say on the release issue and then we can come back to the other issues as they relate --

MR. KING: And we have this --

THE COURT: The UAW, I suspect --

MR. SODKO: If I could just briefly be heard, Judge?

THE COURT: Sure. I'm sorry. I assumed you were going to assume the same position. You have in your brief.

MR. SODKO: Yes, yes, with just one other thing if I might --

THE COURT: Sure.

MR. SODKO: -- point out as well.

THE COURT: Sure.

MR. SODKO: In addition, the policy considerations that underlie this, I mean it would be a terrible policy for the plaintiff to be able to escape a release that's supported by viable consideration that we know the defendants would be able to rely on, their compromise of the claim.

But in addition to that, one of the things we pointed out in our papers that I think merits consideration is there's a general rule of common law that federal courts have also applied that the consideration has to be tendered if you're going to challenge a release on duress or for some other reason.

So I was just going to put that into play as we consider this issue.

THE COURT: Thank you, very much.

Counsel?

MR. DUNNE: Thank you, your Honor.

Just very briefly. It's true that twenty-one of the twenty-two claims who signed releases, Mr. Zeek stated in his affidavit he did not sign a release, and GM nor Delphi could find a release because it's my understanding there was no release signed by Mr. Zeek. The other twenty-one did sign releases.

But the issue is fraud, overreaching. It's duress. This is not a simple release. It's one involving a major union where the plaintiffs allege the union breached its duty of fair representation by agreeing with GM that they could arbitrarily move the individuals, these twenty-two plaintiffs, out of GM's collective bargaining agreement into a corporation not associated with GM. And that's the real issue. Of course, we're not arguing that releases were signed, but as the affidavit said -- so states.

It's not as simple. We're dealing with twenty-two people with an average seniority of twenty-five, twenty-six years with General Motors most of their working life. And to say that they had an opportunity to just quit and then wait seventeen, eighteen years for their pension doesn't fall within the normal category of knowing releases, knowing what the consequences are. They had no choice. They were forced into it by GM with full support and agreement from their union that they pay dues to.

And we think it justifies discovery and proceeding. Releases were not voluntarily made, and we would urge the Court certainly to deny the defendants' motion on that ground.

Thank you.

THE COURT: Thank you.

As to this issue and this issue only, that is the issue of releases, number one, the Court believes the releases in this particular matter are valid. I'll discuss that a little bit more. But let me just talk about the alleged fraud in this matter.

Appendix C

Taking it in the light most favorable to the plaintiffs in this particular matter, if I look at it just kind of an open spectrum the most favorable I could possibly to the plaintiffs, the most that you have is not fraud. The most that you have is some statements as to the status of their employer and so forth. But certainly not fraud and they are individuals with substantial seniority and wherewithal in terms of at least the inter-working of what happens within their particular trade. And certainly there's nothing on this record looking at it most favorable to the plaintiffs that shows any kind of fraud. Duress is even a weaker argument.

It's interesting because I have not had one of these cases before. I think Judge Rosen summarized it pretty well as well as the *Adams* case summarizes it pretty well.

This I think even goes a little bit further. I mean, forty-five days; there was a out period; there was advice to get a lawyer to look at it. I mean, just -- you know, I'm reading it, and I'm reading it and I'm saying -- I mean it was kind of spoon fed to do everything possible to make sure that there were no stones unturned in relation to advising the plaintiffs in this particular matter as to what they were signing, what their rights were. Even an out period after they gave them forty-five days to think the matter over, there was seven days to revoke or to release, a suggestion to make sure they get an attorney, do all those things.

I think that under all of the case law in this circuit the releases are valid and therefore the Court will grant the motion as to all of those plaintiffs based upon the releases except for Mr. Zeek who both sides appear to be on the same

wave length that neither side can find a signed release by Mr. Zeek.

So with that said I certainly -- he's the only one left. I think we have a couple issues there. The state law claims I think you can argue them if you want, but I think they're pretty -- I think it's pretty clear that you were relying upon the collective bargaining agreement and so.

The Thirteenth Amendment argument I think fails drastically. The Thirteenth Amendment was not -- ever intended. There's no case law that I can find or that anybody cited to me either the plaintiff or anyone else in any case that I know of that would make this kind of situation a Thirteenth Amendment claim. The Court will dismiss the Thirteenth Amendment claim. And I think I've covered everything. Is there anything I didn't cover?

Okay, very well.

We'll do the order.

MR. DUNNE: Thank you, your Honor.

THE COURT: Everybody understands the case will proceed as to Zeek but not as to the Thirteenth Amendment claim.

MR. DUNNE: I understand.

MR. KING: Your Honor, on that point -- if the Court will indulge me for a moment, we would ask the Court if we could restrict discovery perhaps to whether he signed the release. That might save the Court time and all of us time.

THE COURT: Counsel -- I don't know what you mean -- I think -- you want to start that as an issue?

MR. KING: I'd like to start with it and end with it, if possible.

THE COURT: Well, you may or not. I don't know. I can't tell you what will come out of it, but what other discovery would there be really?

MR. KING: I don't know if there would be. We would just like to expedite it and move the case along. But we can proceed with that.

THE COURT: See if you have a problem between -- talk -- you know, nobody wants to -- plaintiff or defendant doesn't want to waste any time or money. It probably makes more sense to take his deposition right away, to get that issue and see what happens.

MR. KING: Thank you, your Honor.

THE COURT: I think you have -- did we do a scheduling order on this case?

MR. DUNNE: Not as of yet.

THE COURT: Why don't we do one today since we have everybody here. No sense everyone coming from out of Columbus or wherever --

MR. KING: That would be appreciative.

THE COURT: We have the whole room set up since we have scheduling conferences tomorrow.

I'll do one more case and then I'll be in there to do the scheduling conference.

MR. DUNNE: Thank you, your Honor.

MR. KING: We appreciate it.

THE COURT: Okay.

(Proceeding concluded.)

(2)

No. 05-177

FILED
6 - 2005
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In the
Supreme Court of the United States

WILLIAM R. DORN, SR., ET AL.,
Petitioners,

v.

GENERAL MOTORS CORPORATION, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENTS GENERAL MOTORS CORPORATION AND DELPHI CORPORATION'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Petitioners in this matter raise the following issues:

1. Does an Intake Questionnaire that fully informs the EEOC of all aspects of plaintiff's age discrimination claim under the Age Discrimination in Employment Act suffice to meet the requirements of the EEOC's charge filing requirements.

2. When employees are forced to choose between signing a waiver presented by the employer and the union, accepting either employment or retirement, both of which violates their rights under the employer/union Collective Bargaining Agreement, or be laid off without pay, and the employees sign the waivers under protest, do their arguments fall under the totality of the circumstances.

(Pet'r. App. I.)

CORPORATE DISCLOSURE STATEMENT

General Motors Corporation has no parent corporation, and there is no publicly held company that owns 10% or more of General Motors Corporation's stock. Delphi Corporation has no parent corporation, and there is no publicly held company that owns 10% or more of Delphi Corporation's stock.

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STATEMENT OF THE CASE

In their Statement of the Case, Petitioners omit and/or mischaracterize pertinent facts. For purposes of clarification, the facts of this matter, which were accurately set forth by the Sixth Circuit, are briefly summarized here.

Petitioners worked at a Trenton, New Jersey manufacturing facility operated by General Motors Corporation's ("GM's") former Delphi Division. In June 1998, GM closed the facility. Pursuant to the then-applicable collective bargaining agreement ("CBA") between GM and the United Automobile Workers ("UAW"), Petitioners were placed into a "Protected Status" in which they remained GM employees on active status, but did not hold production jobs or perform production-related work. While on Protected Status, Petitioners were assigned to a Transition Center, where retraining opportunities were available, and they received each week 40-hours pay and benefits at their various regular rates.

In mid-1999, GM's Delphi Division became Delphi Automotive Systems ("Delphi"), an independent, publicly held corporation. Following this "spin off," Petitioners were employees of Delphi. They did not, however, resume production positions, and by late 2000, Petitioners had been in Protected Status for more than two years. At this time, Delphi and the UAW, which remained Petitioner's collective bargaining representative, negotiated a Memorandum of Understanding ("MOU") regarding the closure of the Trenton Transition Center and the redeployment of Petitioners and others who remained at the center. The CBA between Delphi and the UAW contained provisions permitting the parties to enter into such agreements.

The MOU provided for a Special Attrition Plan, DIS-Trenton ("Plan"), which gave affected employees several options upon the shut down of the Transition Center. First, they could transfer to one of several openings at Delphi or GM plants. Persons electing this option were eligible for a $36,000 cash bonus and up to $64,000 in enhanced relocation benefits. Second, if otherwise eligible, employees could retire under the normal or early voluntary retirement provisions of the Delphi Hourly-Rate Employee Pension Plan. Persons selecting this option would receive a $40,000.00 bonus. Third, if eligible, employees could retire under the provisions of a defined letter agreement between Delphi and the UAW. Persons selecting this option would receive a $25,000.00 bonus. Finally, if ineligible to retire, employees could elect to grow into retirement, which allowed them to remain on Protected Status and receive 85% wages and 100% benefits until eligible for retirement. Persons selecting this option would receive a $25,000.00 bonus. Under the terms of the Plan, employees who elected none of these options would remain on Protected Status, but they would not receive a bonus and would become subject to placement at other Delphi facilities.

When Petitioners learned of the MOU, Petitioner Robert Ryan ("Ryan") made a telephone inquiry to the Equal Employment Opportunity Commission ("EEOC"). In response, the EEOC mailed Ryan a letter dated November 28, 2000. This letter stated that:

> **In order for the EEOC to have jurisdiction to investigate any complaint, and to protect your legal rights, a charge of discrimination must be filed within 300 calendar days of the alleged violation.** It is your responsibility to insure that your charge of discrimination is filed in a timely manner. Please be

> advised that at this time you have not filed a charge of discrimination.

(emphasis in the original) The letter, which included a blank intake questionnaire, further indicated that if Petitioners "provided minimally sufficient information" on the questionnaire, they would be contacted to "determine if a charge will be taken." The questionnaire itself provided that "[i]f a charge is filed, the [EEOC] will attempt to settle your case." On January 10, 2001, Petitioner William Dorn ("Dorn") completed the questionnaire. In doing so, Dorn indicated that, in November 2000, he had contacted "Cureton Caplan Attorneys at Law," who "advised that we had a discrimination case [and] to pursue case with EEOC."

By mid-January 2001, each of the Petitioners had selected one of the options available under the Plan. The Petitioners admit that, as part of their participation in the Plan, all of the Petitioners except James Zeek ("Zeek") executed a release.[1] Petitioners' releases waived "all claims, demands and causes of action" against "Delphi, General Motors Corporation, [and] the UAW," including claims under the "Age Discrimination in Employment Act." Petitioners conceded below, as they concede to this Court (Pet'r. App. 16), that they had the experience and education to make an informed decision regarding their releases, that they had time to consider whether or not to sign the waivers and to consult with counsel, that the language and meaning of the waivers was clear, and that they received consideration in exchange for their waivers.

---

[1] As the Sixth Circuit noted, 21 of the 22 Petitioners executed a release. (Pet'r. App. 4a-5a.) Petitioners' contention (Pet'r. App. 3) that only 20 signed is incorrect.

Petitioners allege that, in mid-2001, Dorn had several conversations with the EEOC. However, he did not sign EEOC charges against Delphi and the UAW until December 19, 2001. On February 23, 2002, Dorn executed revised versions of these charges. The EEOC assigned charge numbers to the February 23, 2002 documents only. Petitioners never filed an EEOC Charge against GM.

On March 13, 2002, Petitioners filed suit against GM, Delphi, and the UAW in the United States District Court for the Eastern District of Michigan (hereinafter "Dorn I"). In their complaint, Petitioners asserted, among other things, that the MOU and Plan breached certain CBA provisions and the UAW's duty of fair representation. In September 2002, GM, Delphi and the UAW moved to dismiss the Dorn I complaint contending, among other things, that valid releases barred Petitioners' claims in their entirety. At an oral hearing on December 11, 2002, the district court held that the releases barred the claims of all Petitioners who admittedly signed them. The district court then dismissed certain claims of Petitioner Zeek (who denied executing a release), but the court permitted Zeek's other claims to proceed.

On March 13, 2003, as Zeek's remaining Dorn I claims proceeded, the EEOC issued Petitioners a Right to Sue letter. In June 2003, Petitioners initiated in the United States District Court for the Eastern District of Michigan an Age Discrimination in Employment ("ADEA") action against GM, Delphi, and the UAW (hereinafter "Dorn II"). The district court assigned Dorn II to the judge presiding over Dorn I. In July 2003, GM, Delphi, and the UAW filed motions for summary judgment on remaining Dorn I plaintiff Zeek's claims, and, in August 2003, they filed motions to dismiss the Dorn II complaint. At an oral hearing on December 10, 2003, the district court granted both motions in their entirety.

Notably, in Dorn II, the district court held the ADEA claims against GM failed because Petitioners never filed an EEOC charge against GM and that the ADEA claims against Delphi and the UAW failed because Petitioners' charges against those entities were untimely. The court further held that releases barred the ADEA claims of the 21 Petitioners who signed them.

On January 9, 2004, Appellants filed timely notices of appeal in both the Dorn I and Dorn II cases, and, on April 28, 2005, the United States Court of Appeals for the Sixth Circuit affirmed in an unpublished decision. In relevant portions of its opinion, the Sixth Circuit rejected Petitioners' argument that the releases in this matter should be set aside based upon Petitioners' "economic duress" theory. (Pet'r. App. 6a-10a.) In addition, the Sixth Circuit held in a footnote that Dorn's completed intake questionnaire could not be construed as a charge of discrimination on the facts presented.[2] (Pet'r. App. 13a n.7.) Petitioners failed to brief this latter point to the Sixth Circuit (choosing instead to argue for the application of equitable tolling), but they had raised it in their papers to the district court.

---

[2] In light of this holding, the Sixth Circuit found it unnecessary to address Petitioners' argument that their releases were invalid as to ADEA claims. (Pet'r. App. 8a n.5.)

REASONS FOR DENYING THE WRIT

"Review on a writ of certiorari is not a matter of right, but of judicial discretion." Sup. Ct. R. 10. "A petition for a writ of certiorari will be granted only for compelling reasons." In this case, Petitioners have articulated no such compelling reasons.

I. PETITIONERS HAVE NOT ARTICULATED A COMPELLING REASON TO JUSTIFY REVIEW AS TO THE ISSUE OF DORN'S INTAKE QUESTIONNAIRE

Petitioners first assert that this Court should exercise discretionary review over the Sixth Circuit's holding -- contained in a footnote of its unpublished decision (Pet'r. App. 13a n.7) -- that Dorn's intake questionnaire did not constitute a charge of discrimination. See 29 U.S.C. § 626(d) (providing that an ADEA plaintiff must file a "charge alleging unlawful discrimination" before initiating a lawsuit). Contrary to Petitioners' contention, however, the Sixth Circuit applied the proper rule of law in this matter, and Petitioners have not demonstrated that the Sixth Circuit's opinion conflicts with decisions from other circuits. As such, this Court should deny Petitioners' request for certiorari.

In particular, while Petitioners assert (Pet'r. App. 8-13) that a completed intake questionnaire automatically and in all cases constitutes a charge of discrimination, reviewing courts determine whether a particular questionnaire may function as a charge by conducting a detailed and fact-based inquiry into the events surrounding the filing of the questionnaire. In this respect, the Third, Seventh, Eighth, and Eleventh Circuits hold that an intake questionnaire may function as the equivalent of a charge only if it was "submitted under

circumstances that would lead the EEOC to believe that the complaining party sought 'to activate the Act's machinery.'" Diez v. Minnesota Mining & Mfg. Co., 88 F.3d 672, 676 (8th Cir. 1996) (quoting Steffen v. Meridian Life Ins. Co., 859 F.2d 534, 542 (7th Cir. 1988), cert. denied, 491 U.S. 907 (1989); see also Bost v. Federal Express Corp., 372 F.3d 1233, 1240 (11th Cir.), cert. denied, --- U.S. ---, 125 S.Ct. 656 (2004) (examining whether "the circumstances of the case would convince a reasonable person that the charging party manifested her intent to activate the administrative process") (internal citations omitted); Bailey v. United Airlines, 279 F.3d 194, 199 n.2 (3rd Cir. 2002) (citing Michelson v. Exxon Research & Eng'g. Co., 808 F.2d 1005, 1010-11 (3rd Cir. 1987) and holding that plaintiff's "intake questionnaire was not adequate to constitute a charge"). This Court has underscored the propriety of this line of cases by denying petitions for certiorari with respect the Seventh Circuit's Steffen opinion and Eighth Circuit's Bost opinion. See Steffen, 859 F.2d at 542, cert. denied, 491 U.S. 907; Bost, 72 F.3d at 1240, cert. denied, 125 S.Ct. 656. And, not surprisingly, this approach results in different outcomes in different factual settings. Compare Bost, 372 F.3d at 1241 (finding a questionnaire was not a charge where the undisputed evidence showed that plaintiff "clearly understood that the intake questionnaire was not a charge"); and Diez, 88 F.3d at 677 (finding that a questionnaire was not a charge where there was no evidence that plaintiff was "led . . . to believe that he had done all that was necessary once he returned the questionnaire") with Steffen, 859 F.2d at 544 (finding that a questionnaire was the equivalent of a charge where "the EEOC informed [plaintiff] that it would be treating the Intake Questionnaire as a charge but then failed to treat it as a charge").

Other circuits, while perhaps not as explicit in their standards as the above-listed circuits, have similarly examined the facts and circumstances surrounding the filing of an intake questionnaire to determine whether it constituted a charge of discrimination in a given case. See, e.g., Persik v. Manpower, Inc., 85 Fed.Appx. 127, 131 (10th Cir. 2003), cert. denied, 541 U.S. 1086, reh'g. denied, --- U.S. ---, 125 S.Ct. 18 (2004) (noting that the intake questionnaire in the case warned that "COMPLETING THIS QUESTIONNAIRE DOES NOT CONSTITUTE THE FILING OF A CHARGE" and holding that "[u]nder the circumstances, the charge . . . eventually filed did not relate back to the date of the questionnaire"); Price v. Southwestern Bell Tel. Co., 687 F.2d 74, 78-79 (5th Cir. 1982) (finding a questionnaire to be a charge where the EEOC "at least at the initial stages of the proceedings, considered the circumstances surrounding the receipt" of the document); cf. Waiters v. Robert Bosch Corp., 683 F.2d 89, 91-92 (4th Cir. 1982) (holding that an affidavit functioned as a charge where "the plaintiff attempted to file a charge of discrimination on several occasions" but was precluded from doing so, in part because the relevant EEOC office was "burglarized and [his] file was lost"). This fact-based approach is consistent with Bost, Bailey, Diez, and Steffen.

Here, although its unpublished footnote is possibly less clear than it could have been, the Sixth Circuit's reasoning appears likewise consistent. Notably, the Sixth Circuit cited the Eighth Circuit's Diez opinion, placing the Sixth Circuit within the above-noted line of cases. (Pet'r. App. 13a n. 7.) Moreover, like other circuits, the Sixth Circuit grounded its decision in the facts of this case -- such as "the letter plaintiffs received in November 2000, which informed them of the 300-day charge filing limit," and "the fact that plaintiffs subsequently filed a formal charge," which "indicates that

they understood the difference between a complaint and a formal charge." (Id.) See also Bost, 372 F.3d at 1241; Diez, 88 F.3d at 677.

For their part, Petitioners' cases do not demonstrate a conflict between the Sixth Circuit's decision and those of other circuits. Indeed, while Petitioners place great reliance (Pet'r. App. 8-10) on Steffen, the Seventh Circuit in that case rejected the very proposition that Petitioners now espouse. See 859 F.2d at 542-43 (adopting the fact-based analysis set forth above and rejecting as "overly-simplistic" the contention that a completed intake questionnaire automatically constitutes a charge if it names a respondent and generally alleges discrimination); see also Downes v. Volkswagen, Inc., 41 F.3d 1132, 1138 (7th Cir. 1993) (citing Steffen and holding that an intake questionnaire constitutes a charge only if the facts "would convince a reasonable person that the plaintiff manifested an intent to activate the Act's machinery") (discussed at Pet'r. App. 9-10). Similarly, and as noted above, the Fifth Circuit in Price, 687 F.2d at 78-79 (discussed at Pet'r. App. 10) based its decision on the facts and circumstances of the case before it, not a general rule that completed intake questionnaires constitute charges of discrimination.

Moreover, the Ninth Circuit's decision in Casaventes v. California State Univ., 732 F.2d 1441 (9th Cir. 1984) (discussed at Pet'r. App. 12-13) is distinguishable from the present matter. Central to that court's decision was the fact that the plaintiff acted pro se. Id. at 1442. Here, however, Dorn stated on his intake questionnaire that he had previously contacted "Cureton Caplan Attorneys at Law," who "advised that we had a discrimination case [and] to pursue case with EEOC." Further, there is no indication in the Casaventes case that, as here, the EEOC had sent the plaintiff a letter

detailing the applicable statute of limitations and instructing that it was plaintiff's responsibility to file a timely charge of discrimination. GM and Delphi are unaware of any case in which the Ninth Circuit has considered the question presented on facts similar to those in this case.

Finally, Petersen v. City of Wichita, 888 F.2d 1307 (10th Cir.), cert. denied, 495 U.S. 932 (1989) (discussed at Pet'r. App. 12) is inapposite. That case addressed whether, under Title VII, a verified charge of discrimination related back to an earlier, unverified charge. Id. at 1308. In that case, it was "undisputed" that the plaintiff's earlier filing constituted a charge of discrimination. Id. The court thus did not address the question presented in this case and, as previously noted, the Tenth Circuit recently held that an intake questionnaire did not constitute a charge of discrimination on facts similar to those in this case. See Persik, 85 Fed. Appx. at 131-32.

In sum, Petitioners have not presented this Court with a compelling reason to review the Sixth Circuit's ruling concerning Dorn's intake questionnaire, and this Court should deny Petitioners request for certiorari on this issue.[3]

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[3] Certiorari should be denied with regard to GM for the additional reason that both the district court and the Sixth Circuit held that Dorn did not file even a belated charge of discrimination with respect to GM. Petitioners have not sought to challenge this conclusion.

II. PETITIONERS HAVE NOT ARTICULATED A COMPELLING REASON TO JUSTIFY REVIEW AS TO THE VALIDITY OF PETITIONERS' RELEASES

The Sixth Circuit also rejected Petitioners' contention that, under the totality of the circumstances in this case, their releases are void under an "economic duress" theory. (Pet'r. App. 6a-10a.) Petitioners again proffer no compelling reason (Pet'r. App. 14-20) for the Court to review this determination.

As an initial matter, Petitioners concede that the Sixth Circuit's position on economic duress "seems to be shared by all Circuits." (Pet'r. App. 14.) Petitioners thus do not, and cannot, identify a conflict among the circuits on this issue.

Furthermore, Petitioners are incorrect in their apparent contention (Pet'r. App. 18) that the Sixth Circuit failed to consider their arguments below. While the Sixth Circuit acknowledged (Pet'r. App. 8a-9a) Petitioners' admissions that: 1) they had the experience, background, and education to comprehend their releases, 2) they had time to consider the releases and consult an attorney, 3) the releases were clear, and 4) Petitioners received consideration for their releases, the appeals court went on to recognize (Pet'r. App. 9a) Petitioners' claim "that under the 'totality of the circumstances,' they must be understood to have been coerced into signing the Release, because they were forced to choose between signing it and simply being fired without benefits." The court noted that it had "rejected a nearly identical argument" in Adams v. Philip Morris, Inc., 67 F.3d 580, 583 (6th Cir. 1996). In that case, as here, the plaintiff had argued that his release should be disregarded because "he 'was forced to sign the general release' out of 'extreme economic duress,'" but the Sixth Circuit found that "[a]though he

certainly felt some economic pressure to accept the attractive settlement package" he was offered, "this pressure does not rise to the level of economic duress." Id. In the present matter, the Sixth Circuit found no cause to rule differently. (Pet'r. App. 9a (holding that "recognizing economic duress in situations like those in Adams and the present case would invalidate most, if not all, releases of claims in agreements conferring severance benefits on employees").) Petitioners cite no authority from this Court or any other that would serve to discredit this reasoning.

CONCLUSION

This Court should deny the Petition in its entirety.

Respectfully submitted,

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